

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 August 2003

CASE NO.: 2003-ERA-00017

In the Matter of

JEROME REID
Complainant

v.

NIAGARA MOHAWK POWER CORPORATION
Respondent

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

I. Statement of the Case

This proceeding arises from a complaint filed by Jerome Reid ("Reid") alleging that Niagara Mohawk Power Corporation ("Niagara Mohawk") terminated his employment in violation of the employee protection provisions of the Energy Reorganization Act of 1974, as amended ("ERA"), 42 U.S.C. § 5851, and the regulations promulgated thereunder at 29 C.F.R. Part 24. The case is now before me on Reid's appeal and request for hearing following an investigative finding by the Secretary of Labor that the evidence did not support his allegations of unlawful termination. Since it appeared from the documents in the case file that Reid's appeal and hearing request were filed outside of the time limits established by the applicable regulations, an order was issued, directing Reid to show cause why his complaint should not be dismissed as untimely. Reid has not responded to the order to show cause, and I find upon review of the record that the appeal and hearing request were not timely filed and that grounds for tolling the filing limitation period have not been established. Accordingly, I conclude that his complaint must be dismissed.

II. Findings of Fact and Conclusions of Law

The record shows that Reid filed his complaint with the New York Regional Office of the Occupational Safety and Health Administration ("OSHA") on May 15, 2002. OSHA investigated the complaint, and the OSHA Regional Director issued a notice of determination pursuant to 29

C.F.R. § 24.4(d) (1998) in a letter to Reid dated July 1, 2002, stating in pertinent part, that “[t]he preponderance of credible evidence clearly indicates that your separation from employment . . . was for legitimate business reasons and not a discriminatory reprisal in violation of Section 211 of the Energy Reorganization Act of 1970.” Notice of Determination at 1. The letter further states,

This letter is notification to you that, if you wish to appeal the above findings, you have a right to a formal hearing on the record. To exercise this right you must, **within (5) calendar days of receipt of this letter**, file your request for hearing by facsimile, overnight next day deliver [sic] mail, or telegram to:

**Chief Administrative Law Judge
U.S. Department of Labor
Suite 400, Techworld Building
800 K Street - NW
Washington, D.C. 20001-8002
Tel. (202) 693-7300
Fax (202) 693-7365**

Unless a telegram is received by the Chief Administrative Law Judge within the five day period, this notification of determination will become the Final order of the Secretary of Labor dismissing your complaint.

Notice of Determination at 1-2 (boldface in original). Reid signed a return receipt for the Notice of Determination letter on July 12, 2002.

On May 6, 2003, Reid called Michael Mabee, a supervisory investigator in the OSHA New York Regional Office and requested a copy of the return receipt that he signed for the Notice of Determination letter. He also faxed copies of two letters to Mr. Mabee. One letter, dated June 18, 2002, is addressed to a Matthew A. Gilmartin at the OSHA Regional Office and states, “I Jerome Reid appeal the recent findings by your office and I would like for your Office to re-evaluate those findings by the field investigator for the following reasons: 1) all documentation and witnesses weren’t examine [sic] or interviewed.” The second letter dated October 11, 2002 is also addressed to Mr. Gilmartin and is labeled, “Second Request”. This letter repeats Reid’s request for re-evaluation of the investigative findings. Mr. Mabee responded to Reid by letter dated May 6, 2003, stating that he had reviewed OSHA’s files and could find no evidence that the New York Office ever received either letter prior to May 6, 2003. Mr. Mabee further stated that all ERA appeals must be addressed to the Chief Docket Clerk at the Office of the Chief Administrative Law Judge.

The record shows that Reid next sent an undated letter to the Chief Docket Clerk whose office received the letter via facsimile transmission on June 27, 2003. In this letter, Reid stated that he was submitting an appeal for processing and that he had previously “supplied US DOL OSHA with an appeal letter on or about June 18, 2002 and also faxed a copy of this letter on July 18, 2002.” Attached to this letter is a document dated June 27, 2003 and entitled, “TRANSMISSION LOG”,

which appears to be a record of facsimile transmissions and which shows that one page was faxed to (212) 337-2371 on July 18. The year of the transmission is not shown, and there is a handwritten notation identifying this telephone number as belonging to OSHA.

Reid's appeal was docketed by the Office of the Chief Judge on June 27, 2003. The matter was then assigned to me, and I issued a Notice of Hearing, Order to Show Cause and Pre-Hearing Order on July 8, 2003. The Order to Show Cause stated,

Not later than **Friday, August 1, 2003**, the Complainant shall file a response with the Court, showing cause why his request for hearing, which was received by the Office of the Chief Administrative Law Judge on June 27, 2003, should not be dismissed as untimely because it was not filed pursuant to 29 C.F.R. § 24.4(d)(2) within five business days of May 12, 2002 when the Complainant received the determination letter on his complaint. A copy of this response and any other pleading shall be served on the Respondent and any other interested party.

Reid signed a certified mail return receipt for this order on July 10, 2003. The order was also served on his attorney in a related case, 2000-ERA-00023, and she too signed a return receipt. No response to the order has been filed by or on behalf of Reid. Niagara Mohawk responded by letter dated August 8, 2003, in which it urges that the complaint be dismissed based on Reid's failure to respond to the order to show cause. Reid has not responded to this letter either.

The regulations establish the following time limit and procedure for filing an appeal of a notice of determination on and ERA complaint:

(2) The notice of determination shall include or be accompanied by notice to the complainant and the respondent that any party who desires review of the determination or any part thereof, including judicial review, shall file a request for a hearing with the Chief Administrative Law Judge within five business days of receipt of the determination. The complainant or respondent in turn may request a hearing within five business days of the date of a timely request for a hearing by the other party. If a request for a hearing is timely filed, the notice of determination of the Assistant Secretary shall be inoperative, and shall become operative only if the case is later dismissed. If a request for a hearing is not timely filed, the notice of determination shall become the final order of the Secretary.

(3) A request for a hearing shall be filed with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall be sent by the party requesting a hearing to the complainant or the respondent (employer), as appropriate, on the same day that the hearing is requested, by facsimile (fax), telegram, hand delivery, or next-day delivery service. A copy of the request for a hearing shall also be sent to the Assistant Secretary for Occupational Safety and Health and to the Associate Solicitor, Division of Fair Labor

29 C.F.R. 24.4(d) (1998).¹ As discussed above, Reid was specifically notified by OSHA in the July 1, 2002 Notice of Determination letter that he had to file a request for hearing with the Chief Administrative Law Judge. Although OSHA's letter incorrectly referred to five *calendar* days instead of five *business* days, I find that this error is harmless since Reid filed nothing with the Office of the Chief Administrative Law Judge until June 27, 2003, more than eleven months after he had received OSHA's Notice of Determination letter. See *Howlett v. Northeast Utilities*, USDOL/OALJ Reporter (HTML), ARB No. 99-044, ALJ No. 1999-ERA-1 (ARB Mar. 13, 2001). I similarly find that the erroneous reference to May 12, 2002 instead of July 12, 2002 as the date of Reid's receipt of the Notice of Determination in the order to show cause is harmless since Reid never responded to the order. While filing periods may be equitably tolled in appropriate circumstances; see, e.g., *Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB No. 98-111, ALJ No. 1997-ERA-53 at 37 (ARB Apr. 30, 2001); Reid has offered no evidence or argument to invoke equitable doctrines to revive his untimely hearing request. In view of the facts that (1) the Notice of Determination clearly informed Reid of the procedural requirements for filing a request for hearing, (2) Mr. Mabee's letter of May 6, 2003 reiterated these requirements and (3) Reid filed nothing with the Office of the Chief Administrative Law Judge until June 27, 2003, I conclude that Reid was on notice of the procedural requirements for filing a timely request and simply chose to ignore them. Such unexcused failure to properly file his request in a timely manner requires dismissal of his complaint. *Backen v. Entergy Operations, Inc.*, USDOL/OALJ Reporter (HTML), ALJ No. 95-ERA-46 (ARB June 7, 1996).

¹ The Part 24 regulations were amended effective March 11, 1998 to permit the filing of a request for an ALJ hearing in an ERA case within five **business** days of the receipt of the OSHA determination letter. 63 Fed. Reg. 6622 (Feb. 9, 1998). The regulation had previously required that the hearing request be filed within five **calendar** days. 29 C.F.R. §24.4(d)(3)(i)(1997).

III. Recommended Order

The complaint filed by Jerome Reid on May 12, 2002, alleging that Niagara Mohawk Power Corporation terminated his employment in violation of the Energy Reorganization Act of 1974 is **DISMISSED** with prejudice.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).